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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

On Appeal From The Supreme Court Of Pennsylvania

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Did Pennsylvania courts construe and apply Article VI of the Pennsylvania Tax Reform Code of 1971, as amended, to deprive Appellant equal protection of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, by adjudging Appellant's claim to the manufacturing exemption from Pennsylvania franchise tax by a different definition of the term "manufacturing" than uniformly applied for over 50 years to all other taxpayers claiming the exemption, since no basis exists for the difference and the Pennsylvania courts stated no reason for the difference?

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OCTOBER TERM, 1980

No. _____

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

On Appeal From The Supreme Court Of Pennsylvania

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The *per curiam* order of the Supreme Court of Pennsylvania is not yet reported. The Supreme Court of Pennsylvania delivered no opinion in this case. The order and its related judgment are appended hereto at pages 1a and 2a.

The only opinion delivered in this case was delivered by the Commonwealth Court of Pennsylvania. The opinion of the Commonwealth Court of Pennsylvania is reported at 50 Pa. Commonwealth Ct. _____, 411 A.2d 1287 (1980), and is appended hereto at pages 5a-13a.

GROUNDS OF JURISDICTION

This case arose by *de novo* appeal to the Commonwealth Court of Pennsylvania, pursuant to Section 1104 of The Fiscal Code of the Commonwealth of Pennsylvania, Act of April 9, 1929, P.L. 343, 72 P.S. §1104, as amended, from the various actions of Pennsylvania taxing officials in refusing to allow Appellant the manufacturing exemption from Pennsylvania franchise tax for calendar year 1972. The Commonwealth Court of Pennsylvania affirmed the state taxing officials' denying Appellant the exemption by final order and judgment entered on April 10, 1980.

By *per curiam* order entered on November 3, 1980, without opinion, the Supreme Court of Pennsylvania, affirmed on appeal the decision of the Commonwealth Court of Pennsylvania. Appellant timely filed an application for reargument which the Supreme Court of Pennsylvania denied by *per curiam* order entered on December 18, 1980. The notice of appeal to the Supreme Court of the United States was filed on January 26, 1981 in the Supreme Court of Pennsylvania and on January 22, 1981 in the Commonwealth Court of Pennsylvania.

The jurisdiction of the Court is invoked under 28 U.S.C. §1257(2). This appeal questions Article VI of the Pennsylvania Tax Reform Code of 1971, Act of March 4, 1971, P.L. 88-93, §§601 *et seq.*, 72 P.S. §§7601 *et seq.* (hereinafter the "Act"), as construed by Appellee and as applied by Appellee to Appellant on the ground that such construction and application are repugnant to the Constitution of the United States. Appellant contends that construing and applying the Act to deny Appellant the manufacturing exemption from 1972 Pennsylvania franchise tax violate the equal protection clause of the Fourteenth Amendment of the Constitution of the

United States. Pennsylvania appellate courts construed the Act to apply to Appellant a different definition of the term "manufacturing" than the Pennsylvania appellate courts applied to all other taxpayers claiming the exemption, without voicing any reason for the difference. No reason for the difference exists. The Supreme Court of Pennsylvania's upholding the Act as so applied to Appellant, is repugnant to the Constitution of the United States.

The equal protection clause of the Fourteenth Amendment applies to taxes enacted, imposed and administered by the states. *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949). In the following cases, the United States Supreme Court held that state taxes upheld by state courts were unconstitutional, violating the equal protection clause of the Fourteenth Amendment to the United States Constitution:

WHYY, Inc. v. *Borough of Glassboro*, 393 U.S. 117 (1968), reversing 91 N.J. Super. 269, 219 A.2d 893 (1966);

Wheeling Steel Corp. v. *Glander, supra*, reversing 150 Ohio St. 229, 80 N.E. 2d 863 (1948);

Colgate v. *Harvey*, 296 U.S. 404 (1935), reversing 107 Vt. 28, 175 A.352 (1934);

Steward Dry Goods Co. v. *Lewis*, 294 U.S. 550, (1935), rehearing denied 295 U.S. 768 (1935), reversing 7 F. Supp. 438 (1933);

Liggett Co. v. *Lee*, 288 U.S. 517 (1935), reversing 104 Fla. 609, 141 So. 153 (1932);

Royster Guano Co. v. *Virginia*, 253 U.S. 412 (1920), reversing the Supreme Court of Virginia;

Southern Railway Co. v. *Greene*, 216 U.S. 400 (1910), reversing 160 Ala. 396, 49 So. 404 (1909).

In the following cases, the United States Supreme Court held that state courts' discriminatory enforcement or application of an otherwise valid taxing statute violated the equal protection clause of the Fourteenth Amendment:

Cumberland Coal Co. v. *Board of Revision, Etc.*, 284 U.S. 23 (1931), reversing 302 Pa. 179, 152 A.755 (1930);

Sioux City Bridge Company v. *Dakota County*, 260 U.S. 441 (1923), reversing 105 Neb. 843, 182 N.W. 485 (1921);

Sunday Lake Iron Co. v. *Wakefield*, 247 U.S. 350 (1918), reversing 186 Mich. 626, 153 N.W. 14 (1915).

The revelant portions of Article VI of the Pennsylvania Tax Reform Code of 1971, as amended, are appended hereto at pages 21a-22a.

STATEMENT OF THE CASE

Litigation History. This case is an appeal from the order of the Supreme Court of Pennsylvania denying Appellant's claim to the manufacturing exemption from franchise tax for calendar year 1972. Appellee's taxing officers settled Appellant's 1972 franchise tax, disallowing the manufacturing exemption. Appellant challenged this settlement by timely filing a petition for resettlement with Appellee's Department of Revenue and Department of the Auditor General which refused the petition for resettlement. Appellant appealed the refusal of the petition for resettlement by timely filing a petition for review with Appellee's Board of Finance and Revenue which denied the petition for review by order dated August 27, 1975, with the designee of the State Treasurer dissenting. Thereafter, Appellant timely ap-

pealed the order of the Board of Finance and Revenue to the Commonwealth Court of Pennsylvania.

The Commonwealth Court of Pennsylvania heard the appeal *de novo*, as required by Pennsylvania law. The facts were largely stipulated, and the balance of the record, consisting predominantly of expert testimony proving Appellant's manufacture of electricity, was developed at trial before a judge of the Commonwealth Court sitting without a jury. By order entered March 10, 1980, the Commonwealth Court of Pennsylvania affirmed the order of the Board of Finance and Revenue. Exceptions to the order of the Commonwealth Court of Pennsylvania were filed and dismissed by that Court in its final order entered April 10, 1980. Thereafter, on timely appeal, the Supreme Court of Pennsylvania affirmed the order of the Commonwealth Court of Pennsylvania by *per curiam* order entered November 3, 1980. On November 17, 1980, Appellant timely filed its application for reargument which the Supreme Court of Pennsylvania denied by *per curiam* order entered December 18, 1980. Appellant timely filed its notice appeal to the Supreme Court of the United States in the Supreme Court of Pennsylvania on January 26, 1981 and in the Commonwealth Court of Pennsylvania on January 22, 1981.

The Prothonotary of the Supreme Court of Pennsylvania remitted the Record to the Prothonotary of the Commonwealth Court of Pennsylvania on January 8, 1981.

Facts. Appellant is a Maryland corporation providing electric service to the public only in Maryland. Appellant has charter power to manufacture electricity. Appellant provided no electric service to the public in Pennsylvania. At all times material to this case, Appellant had no service territory or customers in Penn-

sylvania. At all times material hereto, Appellant's only activity in Pennsylvania was its 20% ownership as tenant-in-common in the coal-fired, steam-driven electricity generating power plant at Hatfield's Ferry Power Station (hereinafter the "power plant"), its underlying real property and its electricity output. From its share of the power plant's output, Appellant furnished electric service to its customers in Maryland. The other tenants-in-common with Appellant are Monongahela Power Company and West Penn Power Company.

The power plant is located on the Monongahela River at Mastontown, Greene County, Pennsylvania. The electrical energy manufactured at the power plant is transferred from the electric generating phase circuits at the plant by transmission and distribution lines to the meters of the customers of West Penn Power Company, Monongahela Power Company and Appellant. The power plant was constructed at Mastontown, near an adequate water supply on the Monongahela River and near Pennsylvania's ample coal resources to provide adequate and accessible fuel for the power plant, without having to rely on petroleum imported from foreign nations. The power plant also was located at Masontown near the "load center" in a geographic area convenient to the service territories of Appellant in Maryland, Monongahela Power Company in West Virginia and Ohio and West Penn Power Company in Pennsylvania, thereby minimizing transportation costs for fuel and cost to transmit power over power lines to the customers of the three member companies and their respective service territories.

The construction of large, jointly-owned power plants in Pennsylvania began approximately 15 years ago near Pennsylvania coal resources to meet the growing de-

mand for electrical energy in the mid-Atlantic region. Only six (6) such power plants exist. Ownership of the power plants by several utilities as tenants-in-common makes it possible for small as well as large utilities to participate directly in their benefits. A single, large, multi-owned power plant provides each owner with relatively small increments of capacity on a more orderly and economic basis than is possible through sole ownership of such a plant by one public utility, particularly because of the energy crisis and petroleum shortage. The economies, in both construction and operating costs, inure to the benefit of electricity consumers through lower rates than would otherwise have to be charged. Moreover, such multi-ownership increases reliability of supply and minimizes the owner's risks that result from an extended outage of large units such as a power plant.

Appellant contends that its generating electricity by the coal-fired, steam-driven process at the power plant constitutes manufacturing, which qualifies Appellant for the manufacturing exemption from franchise tax for calendar year 1972. At trial through the expert testimony of Howard B. Hamilton, Ph.D., an electrical engineer registered professionally in Pennsylvania and Ohio and a professor in the Department of Electrical Engineering, University of Pittsburgh, Appellant proved that electricity is manufactured at the power plant by the coal-fired steam-driven process. Dr. Hamilton testified that electricity is a man-made product manufactured at the plant by transforming the raw materials of coal, water and oxygen substantially in form, qualities and adaptability in use into a new and different product — electrical energy. Dr. Hamilton's testimony satisfied *verbatim* the judicial definition of the term "manufacturing".[1]

[1] The definition is quoted *verbatim infra* at 14-15.

(R.169a-172a) Appellee called no witnesses and presented no testimony to rebut Dr. Hamilton's testimony. His opinion that Appellant manufactured electricity at the power plant is uncontroverted.

Article VI of the Act contains the franchise tax, applicable only to foreign corporations, and the capital stock tax, applicable only to Pennsylvania corporations. The capital stock tax is not involved in this appeal. The Act provides the same manufacturing exemption from both taxes. Article VI of the Act, and its predecessor legislation,[2] which pertain to the capital stock tax and the franchise tax, contained no statutory definition of the term "manufacturing". Therefore, the Supreme Court of Pennsylvania judicially defined the term more than 50 years ago. Since then, the General Assembly of the Commonwealth of Pennsylvania amended the franchise tax and the capital stock tax at least 21 times, but never altered the judicial definition of the term "manufacturing" and never enacted a statutory definition for the term.[3] For more than 50 years, Penn-

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[2] A capital stock tax was enacted in 1840 by the Act of June 11, 1940, P.L. 612. This statute contained no manufacturing exemption. A limited manufacturing exemption from capital stock tax was first enacted in 1879 by the Act of June 7, 1879, P.L. 112. Thereafter, succeeding amendments to the capital stock tax legislation expanded the exemption. The franchise tax was enacted in 1935, and applies only to foreign corporations like Appellant. Act of May 16, 1935, P.L. 184. The capital stock tax applies only to domestic, or Pennsylvania, corporations.

[3] By comparison, in 1971, the General Assembly inserted, in the section of the statute containing the manufacturing exemption, exemptions for "processing" and "research and development" and specifically defined those terms, without defining the term "manufacturing". 72 P.S. §7602

sylvania appellate courts and taxing officers applied the same judicial definition to the term "manufacturing" in determining the claims of all corporate taxpayers, domestic and foreign, to the manufacturing exemption, except Appellant. In Appellant's case, the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, without explanation, failed to apply this definition to Appellant, without overruling the definition. No Pennsylvania Court ever applied the definition of manufacturing in determining the manufacturing exemption from capital stock tax or franchise tax which was applied to Appellant in this case, either before or after this case was decided.

Manner of Raising Federal Questions. Appellant first raised the federal constitutional questions involved in this appeal during the administrative proceedings. Appellant pursued the federal constitutional questions at every stage of judicial review. In its petition for review filed with Appellee's Board of Finance and Revenue, Appellant argued as follows:

> "9. Petitioner [Appellant] therefore avers that the settlement herein complained of and the action of the Department of Revenue and the Department of Auditor General in refusing the Petition for Resettlement are erroneous, illegal and void for the following reasons, among others:
>
> * * *
>
> (f) Section 602(b) of the Tax Reform Code of 1971 imposing Franchise Tax on Petitioner provides in part that the manufacturing exemption contained in 602(a) [relating to manufacturing exemption available to domestic corporations from capital stock tax] shall also apply to foreign corporations and in determining the relevant apportionment factors the numerator of the property fraction shall not

include any property attributable to manufacturing with this Commonwealth. Petitioner's tangible property in Pennsylvania is used exclusively in manufacturing electric power and the value thereof was erroneously included in the numerator of the fraction by the Departments.

* * *

(h) Said Settlement, and the action of the Pennsylvania Department of Revenue and the Pennsylvania Department of Auditor General in refusing the Petition for Resettlement result in an arbitrary and illegal tax, contrary to the provisions of Section 1 of the Fourteenth Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution.

(i) Said Settlement, in any event, is greater than the Franchise Tax liability imposed against other taxpayers similarly situate for a comparable period of taxation. Hence, said Settlement is contrary to Section 1 of the Fourteenth Amendment to the United States Constitution and Article VIII, Section 1 of the Pennsylvania Constitution.

(j) Upon all the facts and under the principles above stated, the instant Settlement and the action of the Pennsylvania Department of Revenue and the Pennsylvania Department of Auditor General in refusing the Petition for Resettlement are erroneous, illegal and unconstitutional."

Appellant raised the same arguments nearly *verbatim* in its petition for resettlement filed with Appellee's Department of Revenue and Department of Auditor General. Neither the Board of Finance and Revenue nor the Department of Revenue and the Department of Auditor General issued any opinion in refusing Appellee's petition for review and denying its petition for resettlement.

In appealing to the Commonwealth Court of Pennsylvania from the order of the Board of Finance and Revenue, Appellant included the federal questions in its specification of objections and exceptions, arguing:

> "8. . . . The Order of the Board of Finance and Revenue herein complained is erroneous, illegal and void, for the following specific reasons, among others:
>
> * * *
>
> (c) Section 602(b) of the Tax Reform Code of 1971 imposing Franchise Tax on Appellant provides in part that the manufacturing exemption contained in Section 602(a) shall also apply to foreign corporations and in determining the relevant apportionment factors the numerator of the property fraction shall not include any property attributable to manufacturing within this Commonwealth. Appellant's tangible property in Pennsylvania is used exclusively in manufacturing electric power, and the value thereof was erroneously included in the numeration of other fraction by the Departments.
>
> * * *
>
> (e) Said Settlement and the action of the Pennsylvania Department of Revenue and the Pennsylvania Department of Auditor General in refusing the Petition for Resettlement and the action of the Board of Finance and Revenue in refusing the Petition for Review result in an arbitrary and illegal tax, contrary to the provisions of Section 1 of the Fourteenth Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution.
>
> (f) Said Settlement, in any event, is greater than the Franchise Tax liability imposed against

> other taxpayers similarly situate for a comparable period of taxation. Hence, said Settlement is contrary to Section 1 of the Fourteenth Amendment to the United States Constitution and Article VIII, Section 1, of the Pennsylvania Constitution.
>
> (g) Upon all the facts and under the principles above stated, the instant Settlement and the action of the Pennsylvania Department of Revenue and the Pennsylvania Department of Auditor General in refusing the Petition for Resettlement, and the action of the Board of Finance and Revenue in refusing the Petition for Review are arbitrary, capricious, erroneous, illegal and unconstitutional."

The Commonwealth Court of Pennsylvania erroneously departed from the judicial definition of the term "manufacturing", affirming the order of the Board of Finance and Revenue. Appellant excepted to the decision of the Commonwealth Court of Pennsylvania, but that Court overruled the exceptions and entered a final order in favor of Appellee. Without issuing an opinion, the Supreme Court of Pennsylvania affirmed the Commonwealth Court of Pennsylvania. Thereafter, Appellant timely filed with the Supreme Court of Pennsylvania its application for reargument on several grounds, including constitutional issues. In its application for reargument, Appellant contended, *inter alia*,:

> "4. As a matter of law and fundamental fairness, Appellant is entitled to have its appeal adjudged by the same definition of the term "manufacturing" as consistently applied by your Honorable Court to past tax litigants and as repeatedly accepted by the General Assembly in sessions, spanning more than 50 years. By failing to adjudge Appellant's claim according to its judicial definition of "manufacturing", your Honorable Court failed to apply

> uniformly the manufacturing exemption from franchise tax in violation of Article IX, Section 1 of the Pennsylvania Constitution, and also deprived Appellant equal protection of law in violation of Section 1 of the Fourteenth Amendment to the United States Constitution. Affirming the Order of the Commonwealth Court imposes a greater franchise tax liability against Appellant than against other taxpayers whose franchise tax liability, and exemption therefrom under the manufacturing exemption, were previously adjudged by your Honorable Court under its judicial definition of 'manufacturing'."

The Supreme Court of Pennsylvania refused to hear further argument and denied the application for reargument, without issuing an opinion.

FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal involves the denial of equal protection of law to Appellant in two respects — the refusal to adjudge Appellant's claim to the manufacturing exemption by the standard applied to all other taxpayers who claimed the manufacturing exemption either from franchise tax or capital stock tax and also the discriminatory construction and enforcement of the Act, as so applied against Appellant, while other taxpayers claiming the manufacturing exemption received the benefit of constitutional construction and enforcement of the Act. By refusing to adjudge Appellant's claim to the manufacturing exemption by the standard applied to all other taxpayers seeking the exemption, Pennsylvania appellate courts and taxing officers acted arbitrarily and capriciously.

The Act as Construed by The Supreme Court of Pennsylvania and Applied to Appellant Violates the Equal Protection Clause Because The Supreme Court of Pennsylvania Failed to Adjudge Appellant's Claim to the Manufacturing Exemption by the Standard Applied to All Other Taxpayers Who Claimed the Manufacturing Exemption Either From Franchise Tax or Capital Stock Tax.

Article VI of the Act imposes upon foreign corporations doing business in Pennsylvania an annual tax on the value of its capital stock determined according to statutory valuation methods, as allocated to the Commonwealth of Pennsylvania. 72 P.S. §§7601, 7602. This tax is known as the franchise tax. Section 7602(b) of the Act provides that "in determining the relevant apportionment factors the numerator of the property, payroll, or sales factors shall not include any property, payroll or sales attributable to manufacturing . . . activities in the Commonwealth." 72 P.S. §7602(b). This language is known as the "manufacturing exemption" from franchise tax. The Act also provides a manufacturing exemption from capital stock tax. The Act contains no definition of the term "manufacturing" for the purpose of the manufacturing exemption from franchise tax or capital stock tax. Consequently, the term was judicially defined. Pennsylvania taxing authorities and appellate courts applied the same definition of the term "manufacturing" to all taxpayers, except Appellant, claiming the manufacturing exemption from franchise tax or capital stock tax.

In *Commonwealth* v. *Deitch Company,* 449 Pa. 88, 295 A.2d 834 (1972) the Supreme Court of Pennsylvania

summarized the evolution of the judicial definition of the term "manufacturing":

> "This definitional vacuum [the failure of the Act and its predecessor legislation to define the term "manufacturing"] has been filled by a judicial definition of the term which has emerged from a long line of cases extending back over a hundred year's time.
>
> * * *
>
> The meaning of 'manufacturing' has been restated by this court in *Philadelphia School District* v. *Parent Metal Products, Inc.*, 402 Pa. 361, 167 A.2d 257, 258-59 (1961); 'Manufacturing' as used in a legislative enactment is given its ordinary and general meaning. It consists in the application of labor or skill to material whereby the original article is changed into a new, different and useful article: *Commonwealth* v. *Weiland Packing Company*, 292 Pa. 447, 449, 141 Atl. 148 (1928); *Pittsburgh* v. *Electric Welding Company*, 394 Pa. 60, 145 A.2d 528 (1958). Whether or not an article is a manufactured product depends on whether or not it has gone through a substantial transformation in form, qualities and adaptability in use from the original material, so that a new article or creation has emerged: *General Foods Corp.* v. *Pittsburgh*, 383 Pa. 244, 118 A.2d 572 (1955). If there is merely a superficial change in the original materials, without any substantial or well signalized transformation in form, qualities and adaptability in use, it is not a new article or new production: *Commonwealth* v. *Weiland, supra; Pittsburgh* v. *Electric Welding Co., supra*"' 449 Pa. at 92-94, 295 A.2d at 837.

For more than 50 years, Pennsylvania appellate courts have applied *verbatim* this judicial definition of the term "manufacturing" in adjudging the claims of corporate

taxpayers, foreign and domestic, to the manufacturing exemption from franchise tax and capital stock tax. For example, in 1977, the Commonwealth Court of Pennsylvania applied the definition to rule that a photofinisher engaged in developing negative film and making photographic prints therefrom; developing and processing reversal film into color transparencies, consisting of "slides" and "movie" film; and enlarging negatives, slides and photographs was engaged in manufacturing under the Act. Therefore, the Court held these activities exempt from capital stock taxation under the manufacturing exemption. *Commonwealth* v. *Perfect Photo, Incorporated,* 29 Pa. Commonwealth Ct. 316, 371 A.2d 580 (1977). Similarly, in 1934, applying the same judicial definition of the term manufacturing, the Supreme Court of Pennsylvania affirmed a lower court holding that making concrete qualified for the manufacturing exemption from capital stock tax. *Commonwealth* v. *McCready Rodgers Co.,* 316 Pa. 195, 174 A.395 (1934). The cases are a legion.[4]

However, in denying Appellant's claim to the manufacturing exemption, the Commonwealth Court of Pennsylvania, without explanation and without overruling the definition of the term manufacturing, added the following requirements to the judicial definition:

> "The traditional legal concept assumes tangible 'material' as a starting point, and a continuity of existence of that material into the final product.
>
> * * *
>
> Where no molecules of the original raw material survive in the final product, we thus do not have manufacturing in the judicial sense of 'application of labor and skill' to 'material.'" 411 A.2d at 1290, 1291.

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[4] Various representative cases are listed *infra* at pages 23a-24a.

After so departing from the judicial definition, the Commonwealth Court of Pennsylvania held that Appellant's electricity generating activities at the power plant failed to qualify for the manufacturing exemption. 411 A.2d at 1291. The time honored definition applied by the Pennsylvania courts in adjudging claims to the manufacturing exemption contains no reference to "molecules of the original raw material" and no requirement that such molecules "survive in the final product". The judicial definition imposes no such requirements, but contemplates "a *new article or creation*, without referring to or distinguishing among the terms "tangible", "less tangible" or "intangible". *Compare, Deitch, supra* at 14-15. Research reveals that Pennsylvania courts never applied these requirements in adjudging a taxpayer's claim to the manufacturing exemption, either from franchise tax or capital stock tax.

The Commonwealth Court of Pennsylvania deliberately departed from the judicial definition of the term "manufacturing", in order to deny Appellant's claim to the manufacturing exemption. At trial, Appellee offered as evidence its proposed exhibit no. 1 as part of the testimony of a taxing officer. This exhibit purported to list the franchise tax and capital stock tax liability allegedly paid to the Commonwealth of Pennsylvania for tax years 1971 through 1977 by 18 electricity generating companies. The exhibit showed that this tax liability totaled $209,170,853.00 during that period. Appellant properly objected to this testimony and Appellee's proposed Exhibit No. 1 as irrelevant, immaterial and lacking foundation. The Learned Trial Judge reserved ruling on the admissibility of the testimony and the exhibit, noting, however, as follows:

> "THE COURT: What you really consider relevant is to inform the court *how much revenue hinges on*

> *its decision* in this case, to apprise of the importance of the case." (R.241a) (Emphasis added)

In an offer of proof, Appellee's counsel related to the Court that the purpose of this testimony was to show that "under the taxpayer's interpretation of the statute that between twenty-one and thirty-nine million dollars annually would be lost in revenues to the Commonwealth and perhaps over a hundred million over a five-year period." (R.239a). The Commonwealth Court of Pennsylvania erred in failing to expunge these facts from the record and in failing to rule in its opinion that these facts were not pivotal to its decision to deny Appellant's claim to the manufacturing exemption.

In its briefs and its oral arguments before the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, Appellee, despite Appellant's objections, continued to press its contention that the Commonwealth of Pennsylvania would lose considerable revenues if electricity generating corporations, like Appellant, were granted the manufacturing exemption. In its briefs, Appellant emphasized:

> "The General Assembly never intended to lose the considerable revenues which would be lost if electric generating corporations were granted the manufacturing exemption." Appellee's brief before the Commonwealth Court of Pennsylvania at 47; Appellee's brief before the Supreme Court of Pennsylvania at 39.

In an offer of proof at trial before the Commonwealth Court of Pennsylvania, Appellee's counsel advised that Court:

> "This court may take judicial notice that in that year, 1971, the Commonwealth was in one of its most serious economic and fiscal crises . . . had had

> an unconstitutional deficit of $500,000.000.00 . . . was suspending the manufacturing exemption to generate dollars". (R.238a-239a)[5]

These persistent remarks about the fiscal impact of a decision in this case, despite Appellant's objections, motivated Pennsylvania appellate courts to depart, without explanation, from the time honored judicial definition of the term "manufacturing", without overruling that definition, in order to deny Appellant's claim to the manufacturing exemption thereby avoiding the admittedly adverse fiscal impact on the Commonwealth of Pennsylvania.

As further evidence of the fiscal significance which Appellee attached to Appellant's claim to the manufacturing exemption, Appellee's Department of Revenue introduced into the General Assembly during 1978 legislation amending Article VI of the Act, seeking to restore to the manufacturing exemption from capital stock tax the restriction that the exemption was not available to Pennsylvania corporations which "exercise and enjoy the right of eminent domain" and also seeking to enact for the first time since 1943 that same restriction to the manufacturing exemption from franchise tax. Act of July 1, 1978, P.L. 594. This restriction was deleted by the Act in 1971 as to capital stock tax and by legislation in 1943 as to franchise tax. The 1978 legislation purported to be retroactive to August 31, 1971 or, in the

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[5] By Article VI of the Act, the General Assembly actually suspended the manufacturing exemption from franchise tax and capital stock tax during the period January 1, 1971 through June 30, 1972. By the Act of August 31, 1971, P.L. 362, 389-390, 393 §§5, 8, the General Assembly amended the Act, restoring the manufacturing exemption from franchise tax and capital stock tax, effective July 1, 1972.

alternative, "retroactive to the furthest legal date possible."[6] The 1978 legislation was enacted by the General Assembly after the appeal in this case was filed in an effort to bar the manufacturing exemption claims of electricity generating companies, domestic or foreign, like Appellant, which possess and sometimes exercise the right of eminent domain. The United States Supreme Court infers discrimination in violation of the equal protection clause from a state's amending tax legislation after litigation challenging the tax legislation is commenced. *E.g., Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 416-417 (1920).

The Appellee's fiscal crisis, demonstrated by this legislative history and pressed repeatedly by Appellee during this litigation, despite Appellant's objections, impacted on the courts' decision to deny Appellant's claim to the manufacturing exemption from franchise tax for calendar year 1972, particularly when considered in the context of case law decided by the same Pennsylvania courts observing, albeit *dictum,* that the generation of electricity by whatever method constitutes "manufacturing" in the ordinary meaning of that term. *Commonwealth* v. *Philadelphia Electric Company,* 21 Pa. Commonwealth Ct. 593, 347 A.2d 494 (1975), reversed on other grounds 472 Pa. 530, 372 A.2d 815 (1977); *Golden Triangle Broadcasting, Inc.* v. *City of Pittsburgh,* 31 Pa. Commonwealth Ct. 547, 377 A.2d 839 (1977), affirmed 483 Pa. 525, 397 A.2d 1147 (1978), reargument den. (1979).

[6] Such patently offensive retroactivity contravenes the due process clause of the Fourteenth Amendment to the United States Consittution. *Welch* v. *Henry,* 305 U.S. 134 (1938). Accord *Commonwealth* v. *Budd Company,* 379 Pa. 159, 108 A.2d 563 (1954). Appellant so argued before the Pennsylvania Courts. The enactment of the 1978 Amendment retroactively attempting to reach tax year 1972 in order

The United States Supreme Court always examines the practical operation, application and enforcement of a state's tax statute, in appeals questioning the constitutionality of a state's construing, enforcing or applying the tax statute. In *American Oil Company* v. *Neill,* 380 U.S. 451 (1965), the Court ruled:

> "When passing on the constitutionality of a state taxing scheme it is firmly established that this court concerns itself with a practical operation of the tax, that is, substance rather than form. *State of Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 443-444; *Lawrence* v. *State Tax Commission,* 286 U.S. 276, 280, and cases cited therein. This approach requires us to determine the ultimate effect of the law as applied and enforced by a state or, in other words, to find the operating incidence of the tax. *Connecticut Gen. Life Ins. Co.* v. *Johnson,* 303 U.S. 77, 80."

The practical operation of the tax, and Appellee's application and enforcement of the manufacturing exemption, during its fiscal crisis, by a standard different than applied to all other taxpayers claiming the exemption, denied Appellant the equal protection of law guaranteed by the Fourteenth Amendment to the United States Constitution. This Court consistently declares state taxing statutes which deny equal protection of the law to be unconstitutional.

In *Southern Railway Co.* v. *Greene,* 216 U.S. 400 (1910), the court held that an Alabama Franchise Tax which applied only to foreign corporations, and not to domestic corporations, violated the equal protection

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to bar Appellant's claim admits the validity of Appellant's claim, and also demonstrates Appellee's discrimination against Appellant in violation of the equal protection clause. *Royster Guano, supra.*

clause of the Fourteenth Amendment. The Alabama Supreme Court and taxing officials advanced no explanation for treating foreign corporations differently than domestic corportions.

In *Colgate* v. *Harvey*, 296 U.S. 404, 423 (1935), an exemption from Vermont income tax for interest received on money loaned within Vermont was held invalid under the equal protection clause. The Court ruled that classification must rest upon some difference having a fair and substantial relation to the object of the legislation, applying the following test:

> "* * * does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation? 'Mere difference is not enough * * *'"

In *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550 (1935), the Court held that the Kentucky adjusted gross sales tax could not be sustained as an excise on the privilege of merchandising, because no reasonable relation existed between the amount of the tax and the value of the privilege so as to justify discrimination between taxpayers.

In *Liggett Co.* v. *Lee*, 288 U.S. 517 (1933), a Florida statute which levied a heavier privilege tax per store on the owner whose stores were in different counties than on the owner whose stores were all in the same county was held by the Court to be arbitrary and void, because there was no "reasonable basis for this classification".

In *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117 (1968), the Court held that the taxation of the real property of foreign nonprofit corporations by the State

of New Jersey while according an exemption to domestic nonprofit corporations denied the foreign nonprofit corporations equal protection of the laws in violation of the Fourteenth Amendment to the Constitution. As in *Colgate, Stewart* and *Liggett, supra*, the state courts and taxing officials in *WHYY* advanced no rational explanation to justify the inequality of treatment between taxpayers. In *Greene*, the court inferred arbitrary discrimination violating the equal protection clause from state tax officials' failure to advance any reason for the different treatment of the taxpayer. 253 U.S. at 415-416. Similarly, in the instant case, the Pennsylvania appellate courts advanced no explanation at all for their failing to adjudge Appellant's claim to the manufacturing exemption by the judicial definition uniformly used for more than 50 years to adjudge the claims of all other taxpayers seeking the exemption. Consequently, tested against *Greene* and its progeny, *supra*, the Pennsylvania appellate courts' construction and application of the manufacturing exemption under the Act, in Appellant's case, violate the equal protection clause. The Pennsylvania courts offered no explanation to justify their departing from the judicial definition of the term "manufacturing". Except for Appellee's fiscal crisis, no explanation exists!

Appellee's Discriminatory Enforcement of the Manufacturing Exemption Against Appellant Under an Otherwise Constitutional Statute Violates the Equal Protection Clause.

Under the equal protection clause, discriminatory administration and enforcement of an otherwise valid tax statute vitiates the statute. *Cumberland Coal Co.* v. *Board of Revision, Etc.*, 284 U.S. 23 (1931); *Sioux City Bridge Company* v. *Dakota County*, 260 U.S. 441 (1923); *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 (1918).

In *Sioux City, supra*, only taxpayer's bridge was assessed at full market value, and the property of all other taxpayers in the jurisdiction was assessed at substantially less than full value. The Nebraska Supreme Court held that the taxpayer's remedy was for the taxing authority to reassess the property of the other taxpayers at full value. The United States Supreme Court reversed, under the equal protection clause, holding:

> "This Court holds that the right of the taxpayer whose property alone is taxed at 100 percent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect the decision of the Nebraska Supreme Court in this case upholds the violation of the Fourteenth Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment." 260 U.S. at 446-447.

Similarly, in *Sunday Lake Iron, supra*, the Court cautioned:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property." 247 U.S. at 352-353.

Accord, *Cumberland Coal Co., supra*, wherein the Court followed *Sioux City* and *Sunday-Lake Iron*,

reversing the Supreme Court of Pennsylvania. In *Cumberland Coal Co.*, the Court held that the equal protection clause prevents taxing authorities from assesssing at uniform rate all coal in continuous vein, disregarding differences in actual or market value due to distances from transportation facilities and other factors. The taxing authorities' disregard of these differences in administering the tax constituted arbitrary discrimination repugnant to the equal protection clause. 284 U.S. at 28-30.

The equal protection clause requires that taxpayers, individual and corporate, bear the burdens of citizenship on a non-discriminatory basis. If Appellee's taxing officers and courts succeed, without any basis or explanation, in denying Appellant the manufacturing exemption by ignoring the time honored definition of the term "manufacturing" applied to all other taxpayers seeking the exemption, without overruling that definition, then the state tax liability of each taxpayer, individual or corporate, will hinge on the whim and fancy of every official vested with decision making power in state government. As a result, the equal protection clause will cease to safeguard taxpayers from the caprice or whim of the taxing power of state governments throughout the nation.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted and the order of the Supreme Court of Pennsylvania must be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Order And Judgment Of The Supreme Court Of Pennsylvania

[J311]

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 80-1-92

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

Appeal from the Final Order entered April 10, 1980 of the Commonwealth Court of Pennsylvania at No. 1315 C.D. 1975 Argued September 24, 1980

ORDER

PER CURIAM:

Filed: November 3, 1980

Order of Commonwealth Court is affirmed.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 80-1-92

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the COMMONWEALTH COURT OF PENNSYLVANIA, be, and the same is hereby Affirmed.

BY THE COURT:

CARL RICE, ESQUIRE
Prothonotary

Dated: November 3, 1980

APPENDIX B

Order Of Pennsylvania Supreme Court On Appellant's Application For Reargument

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"December 18, 1980

Denied.

Per Curiam"

APPENDIX C

Opinion And Final Order Of The Commonwealth Court Of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1315 C.D. 1975

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

BEFORE: HONORABLE JAMES S. BOWMAN, *President Judge*
HONORABLE JAMES C. CRUMLISH, JR., *Judge*
HONORABLE GLENN E. MENCER, *Judge*
HONORABLE THEODORE O. ROGERS, *Judge*
HONORABLE DAVID W. CRAIG, *Judge*

ARGUED: November 14, 1979

OPINION BY JUDGE CRAIG

FILED March 10, 1980

The Potomac Edison Company (taxpayer) appeals from the order of the Board of Finance and Revenue sustaining the Department of Revenue's settlement of its 1972 franchise tax, in the amount of $65,363.10 with interest. The Department of the Auditor General approved the settlement, and taxpayer filed a petition for resettlement with the Department of Revenue and the Department of the Auditor General, which was refused. Taxpayer appeals.

Taxpayer is a Maryland corporation operating as a public utility, with a certificate of public convenience from the Pennsylvania Public Utility Commission. Taxpayer is a tenant-in-common, with West Penn Power Company and

PREVIOUS PAGE WAS BLANK

Monongahela Power Company, of a site known as Hatfield's Ferry Power Station (station), where those tenants operate a steam-driven electric power plant as a joint venture. Taxpayer owns an undivided 20% interest in the power plant and the underlying real property. From its share of the output of the station, taxpayer furnishes electric service only to customers in Maryland.

Section 602(b) of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §7602(b), imposes a franchise tax on every foreign corporation, joint-stock association and limited partnership, but provides:

> "That the manufacturing, processing, research and development exemptions as contained under section 602(a) [imposing a tax on the capital stock of domestic corporations] shall also apply to foreign corporations. . . ."[1]

Section 602(a), 72 P.S. §7602(a) states that:

> "Provided, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, . . . organized for manufacturing, processing, research or development purposes. . . ."

Section 4 of the Act of July 1, 1978, P.L. 594, eliminated the manufacturing exemption as to those companies that "enjoy and exercise the right of eminent domain." The intent

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[1] The Act of March 4, 1971, P.L. 6 eliminated the manufacturing exemption for capital stock and franchise tax purposes, retroactive to January 1, 1971. By the Act of August 31, 1971, P.L. 362, the General Assembly again adopted a "manufacturing, processing, research and development" exemption, effective June 30, 1971 [*sic*; the exemption was restored effective July 1, 1972]. The disqualification for those otherwise exempt manufacturing, processing or research companies who "enjoy or exercise" the right of eminent domain did not appear in the tax legislation until by Act of July 1, 1978, P.L. 594, the eminent domain disqualfication was reenacted.

of the General Assembly, as stated in Section 3 of that act, was that this ineligibility for the manufacturing exemption be retroactive to August 31, 1971, or the "furthest legal date possible," if the retroactive effect to the stated date was determined to be unlawful.

Taxpayer contends that the production of electrical energy constitutes "manufacturing" for the purposes of Section 602(b), and that it is entitled to the exemption for the calendar year 1972.

The Commonwealth submits that taxpayer is not involved in "manufacturing" as that term has been defined by the case law, and alternatively contends that the intent of the legislature was not to include electric generating companies in the class of companies otherwise entitled to manufacturing exemptions.[2]

The applicability of the manufacturing exemption of the Tax Reform Code of 1971 to a corporation engaged in the production of electricity has not previously been directly before this court. Taxpayer relies upon precedents which this court, in *Golden Triangle Broadcasting, Inc.* v. *City of Pittsburgh*, 31 Pa. Commonwealth Ct. 547, 558, 377 A.2d 839, 845 (1977), characterized as "somewhat old and vague authority for the proposition . . . that the production of electricity, which could be considered an intangible, is 'manufacturing'." Specifically taxpayer relies on *Southern Electric Light and Power Co.* v. *Philadelphia*, 191 Pa. 170, 43 A. 123 (1899), and *Commonwealth* v. *Northern Electric Light and Power Co.*, 145 Pa. 105, 22 A. 839 (1891).

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[2] The Commonwealth also submits that if this court determines that taxpayer is involved in manufacturing, taxpayer would nonetheless be disqualified from the exemption under Section 2 of the Act of July 1, 1978, P.L. 594, amending Section 7602(a) and (b) of the Tax Reform Code of 1971, because it is a company that enjoys and exercises the right of eminent domain, as noted above.

In *Northern Electric, supra*, the Supreme court had to determine whether a company which produces electricity was a manufacturing company within the meaning of the Act of June 30, 1885, P.L. 193, which placed a tax on the capital stock of domestic corporations while exempting manufacturing companies from such taxation. The controlling question in the case was the sense in which the term "manufacturing companies" was used under the statute. The court specifically stated that it would not decide the question of whether the production of electricity was manufacturing, although the lower court had determined that it was not. The court held that Northern Electric was not entitled to exemption from the capital stock tax and based its holding on the definition of "manufacturing companies" as found in the general incorporation act, Act of April 29, 1874, P.L. 73, which provided for classes of manufacturing corporations, none of which included corporations engaged in providing a service of a quasi-public nature. The Supreme Court said:

> "Such companies have never been included in any of the legislation provided for the encouragement and protection of manufacturing corporations, and have no right to share in the benefits of such legislation. They really form a class by themselves." *Northern Electric and Power Co., supra*, 145 Pa. at 120, 22 A. at 841.

Although the court also stated that, "if this case depended on the question on which it turned in the court below, we should be led by the findings of fact to a different conclusion of law from that which was there reached, and hold that this company was a manufacturing company" 145 Pa. at 118, 22 A.2d at 840, that statement as to the meaning of manufacturing as a function was dictum because the court's actual holding was limited to the definition of "manufacturing companies."

In *Southern Electric Light and Power Co., supra*, the Supreme Court held that, although land parcels were held in reserve for future use, they were nevertheless part of the

premises exempt from local real estate tax. The brief per curiam opinion disclaims any distinction between the "manufacturing" of electricity and the "supplying" of it. The court was emphasizing the unity of the generating and distribution aspects, and whether Southern Electric's business actually constituted "manufacturing" was not before the court.

Thus, we do not believe that the above-cited cases have conclusively determined whether, for purposes of the Tax Reform Code of 1971, electric power companies are entitled to the manufacturing exemption.

We now hold, after a careful review of the applicable law, the parties' stipulations and the testimony at the evidentiary hearing, that an electric company is not entitled to the manufacturing exemption because the production of electricity is not manufacturing.

In considering whether the activities involved in the production and distribution of electricity constitute "manufacturing", the difficulty is the absence of a statutory definition of that term for the present context.[3] "Whether a particular activity is 'manufacturing' as that term has been defined by *case law only* is purely an issue of law under the facts of a particular case." *Golden Triangle Broadcasting, Inc.*, *supra*, 31 Pa. Commonwealth Ct. at 551-52, 377 A.2d at 842. (Emphasis in original.)

Of course, a modern generating plant is a technologically complex and sophisticated operation requiring expertise, labor and great expense.

At the evidentiary hearing, Dr. Howard Hamilton, a professor of electric power engineering at the University of Pittsburgh, testified extensively for the taxpayer on the

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[3] Section 602(c), 72 P.S. §7602(c), defines 14 operations that constitute "processing" for purposes of the processing exemption in Section 602(b).

production of electricity. He stated his opinion that useful electrical energy is a man-made product. He outlined the process by stating:

> "A. [W]e are taking raw materials, coal oxygen, in the form of air, water, and performing a series of processes with these ingredients, and the ultimate output is electrical energy or electricity as you mentioned."
>
> "Q. Describe this process.
>
> "A. Well, coal itself has an inherent energy. . . . The energy that is in this, or in the fuel here, in the coal, is energy in chemical form, and first in the process of producing electricity *the energy and the fuel is converted to heat*, and *the heat energy so produced is then carried along by water or steam*, in other words, we heat the water, the water is changed to vapor form, and *this acts as a carrier for the heat energy*; *the heat energy and the vapor or steam enters the steam turbine*, the *steam turbine converts the heat energy into mechanical energy*, the *shaft of the steam turbine then transmits the mechanical energy into the generator*, and the *generator's purpose is to convert the mechanical energy into electrical energy*, thus we have the complete cycle.
>
> "There are a lot of other activities associated with these multiple conversion processes that I haven't mentioned, for example, when you are circulating water, we are chemically treating the water to maintain purity, a great many aspects of the whole operation that are peripheral to but necessary in this energy conversion process.
>
> "*Essentially we are starting with chemical energy and going through the processes and finally coming out with electrical energy.*" (Emphasis supplied.)

Reviewing the judicial interpretation of the term "manufacturing" in *Commonwealth* v. *Deitch Co.*, 449 Pa.

88, 93, 295 A.2d 834, 837 (1972), our Supreme Court quoted with approval from *Commonwealth* v. *Berlo Vending Co.*, 415 Pa. 101, 104, 202 A.2d 94, 96 (1964):

> "'The meaning of "manufacturing" has been restated by this Court in *Philadelphia School District* v. *Parent Metal Products, Inc.*, 402 Pa. 361, 364, 167 A.2d 257, 258-59 (1961); "'Manufacturing' as used in a legislative enactment is given its ordinary and general meaning. It consists in the application of labor or skill to material whereby the original article is changed into a new, different and useful article: *Commonwealth* v. *Weiland Packing Company*, 292 Pa. 447, 449, 141 Atl. 148 (1928); *Pittsburgh* v. *Electric Welding Company*, 394 Pa. 60, 145 A.2d 528 (1958). . . ."
>
> "'On the same day as the decision in Parent Metal Products Co., we also decided *Philadelphia School District* v. *Rosenberg*, 402 Pa. 365, 368, 167 A.2d 259-60 (1961), in which we emphasized that "it is the popular or practical understanding of what is 'manufacturing' that prevails and is intended."'
>
> "Concededly, 'it is sometimes difficult to determine with legal exactness what is and what is not manufacturing', *Commonwealth* v. *McGrady-Rodgers Co.*, 316 Pa. 155, 158, 174 A. 395 (1934), for as one court has observed, '[i]t is easier to feel the line of distinction than to express it. . . .' *Philadelphia School District* v. *Mutual Trimming Co.*, 14 Pa. D.&C. 2d 207, 209 (1957)."

Thus, the touchstone of the legal concept of the term "manufacturing" is the application of skill and labor to original "material" whereby it is substantially changed into a new, different and useful "article". The traditional legal concept assumes tangible "material" as a starting point, and a continuity of existence of that material into the final product.

We therefore find crucial to our determination the fact, as the parties' stipulation and the testimony of taxpayer's expert witness point out, that the original material here, coal, is not material which survives in the new "product"; coal is simply the chemical energy source from which the entire process of electric generation begins, and in the process it is consumed and discarded. The harnessing of heat energy from the coal fuel, its conversion into mechanical energy in the turbine and the final conversion to electrical energy in the form of an electric current, is hence not "manufacturing" in the ordinary understanding of that term. Where no molecules of the original raw material survive in the final product, we thus do not have manufacturing in the judicial sense of "application of labor or skill" to "material."

We recognize that, in this electronic age, it may be scientifically myopic to recognize only continuity of tangible material and to ignore the equally real — although less tangible — continuity of elemental energy. However, we are construing legislation and therefore believe that the legislature intended to use the ordinary (and perhaps more easily applied) concept of tangible material. Until the legislature expressly indicates an intent to embrace more scientific concepts, we must assume adherence to "the popular and practical understanding," as the Supreme Court said in *Deitch*, *supra* and *Berlo Vending*, *supra*.

Having determined that taxpayer is not entitled to the manufacturing exemption of the franchise tax, we need not consider the eminent domain disqualification issue, but may proceed to enter judgment in favor of the Commonwealth and against taxpayer in the amounts stipulated to by the parties in their Stipulation of Facts I (dated May 4, 1979): $97,755.00 of which $65,363.10 has been paid by taxpayer. The remainder shall be paid with interest, as provided by law.

David W. Craig, Judge
DAVID W. CRAIG

President Judge Bowman did not participate in the decision in this case. Judge DiSalle did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1315 C.D. 1975

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

ORDER

AND NOW, this 10th day of March, 1980, unless exceptions are filed within thirty days of the date hereof, the Order of the Board of Finance and Revenue is affirmed. Judgment is entered in favor of the Commonwealth of Pennsylvania, and against Potomac Edison Co., with interest, in the amount stipulated by the parties in their Stipulation of Facts I, dated May 4, 1979 ($97,755.00 of which $65,363.10 has already been paid).

/s/ DAVID W. CRAIG
David W. Craig, *Judge*

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1315 C.D. 1975

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

FINAL ORDER

AND NOW, this 10th day of April 1980, the Exceptions of Appellant, The Potomac Edison Company, are overruled. The Order of the Board of Finance and Revenue is affirmed, and the appeal of The Potomac Edison Company from the Order is dismissed and denied. Judgment is directed to be entered in favor of the Commonwealth of Pennsylvania and against The Potomac Edison Company, with interest, in the amount stipulated by the parties in their Stipulation of Facts I, dated May 4, 1979 ($97,755.00 of which $65,363.10 has already been paid).

BY THE COURT

/s/ GLENN E. MENCER, *Judge*

APPENDIX D

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1315 Commonwealth Docket 1975

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

Notice of Appeal To The Supreme Court Of The United States

Notice is hereby given that The Potomac Edison Company, the Appellant, hereby appeals to the Supreme Court of the United States from the *per curiam* order and the judgment of the Supreme Court of Pennsylvania, entered November 3, 1980, application for reargument denied *per curiam* December 18, 1980, upholding the disallowance of Appellant's claim to the manufacturing exemption from 1972 Pennsylvania Franchise Tax and the validity of Article VI of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 88-92 §§601 *et seq.*, as amended, 72 P.S. §§7601 *et seq.*, as amended, as applied to Appellant.

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This appeal is taken pursuant to the United States Code Title 28 Section 1257(2).

Respectfully submitted,

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Lloyd R. Persun

/s/ HOWELL C. METTE
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Attorneys for Appellant

Filed: January 22, 1981

IN THE SUPREME COURT OF PENNSYLVANIA

No. 80-1-92

THE POTOMAC EDISON COMPANY, *Appellant*,

v.

COMMONWEALTH OF PENNSYLVANIA, *Appellee*.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that The Potomac Edison Company, the Appellant, hereby appeals to the Supreme Court of the United States from the *per curiam* order and the judgment of the Supreme Court of Pennsylvania, entered November 3, 1980, application for reargument denied *per curiam* December 18, 1980, upholding the disallowance of Appellant's claim to the manufacturing exemption from 1972 Pennsylvania Franchise Tax and the validity of Article VI of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 88-92 §§601 *et seq.*, as amended, 72 P.S. §§7601 *et seq.*, as amended, as applied to Appellant.

This appeal is taken pursuant to the United States Code Title 28 Section 1257(2).

Respectfully submitted,

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Filed: January 26, 1981

APPENDIX E

Relevant Portions Of Article VI Of The Pennsylvania Tax Reform Code Of 1971, As Amended

(Act of August 31, 1971, P.L. 389-390)

ARTICLE VI
CAPITAL STOCK-FRANCHISE TAX

* * *

PART II
IMPOSITION OF TAX

Section 602 Imposition of Tax.

(a) ***Provided, That the provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships and joint-stock associations organized for manufacturing, processing, research or development purposes, which is invested in and actually and exclusively employed in carrying on manufacturing, processing, research or development within the State, but every corporation, limited partnership or joint-stock association organized for the purpose of manufacturing, processing, research or development shall pay the State tax of ten mills herein provided, upon such proportion of its capital stock, if any, as may be invested in any property or business not strictly incident or appurtenant to the manufacturing, processing, research or development business, in addition to the local taxes assessed upon its property in the district where located, it being the object of this proviso to relieve from State taxation only so much of the capital stock as is invested purely in the manufacturing, processing, research or development plant and business.

and pay into the treasury of the Commonwealth annually, through the Department of Revenue, a franchise tax at the rate of ten mills for the calendar year 1971 and the fiscal year beginning in 1971 and each year thereafter, upon a taxable value to be determined in the following manner. The actual value of its whole capital stock of all kinds, including common, special, and preferred, shall be ascertained in the manner prescribed in Section 601 of this article. The taxable value shall then be determined by employing the relevant apportionment factors set forth in Article IV: Provided, That the manufacturing, processing, research and development exemptions as contained under section 602(a) shall also apply to foreign corporations and in determining the relevant apportionment factors the numerator and the property, payroll, or sales factors shall not include any property payroll or sales attributable to manufacturing, processing, research or development activities in the Commonwealth.

APPENDIX F

Listing Of Cases

Commonwealth v. *Boyer Plumbing & Heating Co.*, 49 C.C. 610, 30 D. 275 (1920)

Commonwealth v. *Weiland Packing Co.*, 292 Pa. 447, 141 A.246 (1928)

Commonwealth v. *Paul W. Pounds Co.*, 316 Pa. 29, 173 A.633 (1934)

Commonwealth v. *McCrady-Rodgers Company*, 316 Pa. 155, 174 A.395 (1934)

Commonwealth v. *Trinity Court Studios*, 37 Dauphin 244 (1934)

Commonwealth v. *Harrisburg Gas Company*, 50 Dauphin 383 (1941)

Commonwealth v. *American Ice Co.*, 406 Pa. 322, 178 A.2d 491 (1962)

Commonwealth v. *Berlo Vending Company*, 415 Pa. 101, 202 A.2d 94 (1964)

Commonwealth v. *Tetley Tea Co., Inc.*, 421 Pa. 614, 220 A.2d 832 (1966)

Commonwealth v. *Rudd-Melikian, Inc.*, 86 Dauphin 275, 41 D & C 2d 425 (1966)

Commonwealth v. *Babcock Lumber Co*, 1 Pa. Commonwealth Ct. 32 271 A.2d 889 (1970)

Morrisville Scrap Processing Company, Inc. Tax Appeal, 6 Pa. Commonwealth Ct. 121, _____ A.2d _____ (1972) affirmed 453 Pa. 610, 307 A.2d 905 (1973)

Commonwealth v. *Deitch Co.*, 449 Pa. 88, 295 A.2d 834 (1972)

Commonwealth v. *Perfect Photo, Inc.*, 29 Pa. Commonwealth Ct., 316, 371 A.2d 580 (1977)

This listing of cases is not exhaustive. There are numerous other cases involving the manufacturing exemption not only from capital stock tax or franchise tax but also from various local taxes such as mercantile taxes and business privilege taxes, which apply the judicial definition of the term "manufacturing". E.g., *Philadelphia School District* v. *Parent Metal Products, Inc.*, 402 Pa. 361, 167 A.2d 257 (1961); *Pittsburgh Press Co.* v. *City of Pittsburgh*, 14 Pa. Commonwealth Ct. 551, 322 A.2d 290 (1974).